Supreme Court, U.S.
FILED

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Supreme Court of the United States

KENNETH WITHROW and FRANKLIN WITHROW,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) What causes a property owner to **lose** standing to contest a forfeiture?

[e.g., whether a person who purchases vacant land with his own money, who builds a home on that land with his own money, his own materials, and his own labor, who then turns the maintenance of the property (which has a stipulated value of $121,000) over to his grown son but maintains some limited supervision in his old age, and who owns the property for twelve years without incident, loses standing to contest forfeiture?]

(2) Does the possession of 22.9 ounces of undried marijuana plants grown and harvested elsewhere authorize a forfeiture of property under the statute?

(3) If so, is such a forfeiture barred under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution?

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Petitioners, Kenneth and Franklin Withrow, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and is reproduced as Appendix A. The opinion of the district court is also unpublished and is reproduced as Appendix B.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed in this Court was entered by the United States Circuit Court of Appeals for the Eleventh Circuit on June 16, 1997.

A timely motion for reconsideration was filed; a decision of the Court of Appeals denying in part and granting in part the Motion for Reconsideration was entered on March 10, 1999; the matters addressed by the Court of Appeals in the remand to the United States District Court for the Northern District of Georgia were not raised by Petitioners, are not involved in the appeal, and review of the issue on remand will not be sought by these Petitioners.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions involved are the Eighth Amendment to the United States Constitution in its excessive fines clause and 21 U.S.C. § 881(a)(7). The relevant portions are as follows:

21 U.S.C. § 881(a)(7):

> All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

STATEMENT OF THE CASE

Petitioners are father and son. In 1981 the father (Kenneth Withrow — hereafter Kenneth) cashed in a Certificate of Deposit at the Bank of Ellijay in the principal amount of $15,000 and used said sum to purchase, in his name, 5 acres of land in Murray County, Georgia. Kenneth owned other land, including timber land, and owned a sawmill. Kenneth cut timber, sawed it in his sawmill and, together with the labor of his two grown sons (Franklin and Johnny) constructed the home with their own materials and labor. Kenneth lives and at all times lived approximately 15 miles away from the subject property and at all times his son (petitioner) Franklin lived on the subject property. For the ensuing 12 years, the arrangement continued, with Kenneth paying some of the taxes and maintenance and Franklin paying some, in an informal, familial manner. In the early summer of 1993 United States Forest Service Agents observed marijuana patches growing approximately a mile from the subject property. They staked out and hid a camera near the marijuana patches which were clearly visible from the State Highway 52 in Murray County, and which were adjacent to roadside blackberry bushes. In late July 1993, while blackberry picking, Franklin discovered the patches near the highway. On September 2, 1993 Franklin returned to the patches, and was caught on film pulling up one or more plants. Then on September 8, 1993 the property was raided by the State Police and other state law enforcement agencies. They found a marijuana plant hanging from the head of a deer that was mounted in the living room and two small plants in the yard. Franklin pled guilty to the offense of simple possession of 9 ounces of marijuana and was sentenced to jail. Under Georgia law,

no fine is allowed for the offense. Kenneth was not accused of any wrongdoing whatsoever.

The United States Government then filed a petition in the United States District Court for the Northern District of Georgia, Rome Division, seeking forfeiture of the subject 5 acres and home. Prior to trial the United States Government and the Petitioners herein stipulated that the value of the property with improvements was $121,000. At trial, the trial judge determined that the weight of the undried contraband, including roots, stems, etc. was 22.9 ounces (the State Charge being that the usable weight of the marijuana was 9.0 ounces), that the value of the contraband was $3,500 — or nearly $400 per ounce — and then ordered forfeiture of the subject real property.

The Order of the United States District Court is erroneous for many reasons requiring a lengthy analysis as set forth below.

A. Standing

While it was disputed whether Franklin's ex-wife contributed 20% of the initial purchase price (she had no records to establish her claim while Kenneth had complete records showing the source of all funds used in the purchase), it was undisputed that the vast majority — if not all — of the funds and materials for the purchase of the land and the construction of the home came from Kenneth: the $15,000 purchase price came from Kenneth Withrow's Certificate of Deposit; Kenneth Withrow still had, fifteen years later at trial, original checks and invoices for materials he purchased for the construction of the home, such as pipe

and wiring, totaling $6,100.53, as expressly included by the trial court in its findings of fact. Franklin's ex-wife even claimed that the purchase was a loan from Kenneth, but had no loan documents, no loan payments, no witnesses to the loan agreement. The trial court went even further in its findings of fact stating that "Kenneth Withrow provided funds for the purchase of the defendant property and provided some labor and materials for the construction of the house. . . ." It was undisputed that Kenneth was the only title holder of record for the entire time since the purchase and was billed for and responsible for all taxes on the subject property. It was undisputed that as late as three months prior to the police raid, Franklin told a prospective renter that all decisions regarding the use of the subject property were to be made by the owner, his father Kenneth. It was undisputed that Franklin and Kenneth had been in a dispute concerning the maintenance of the siding on the home — siding that Kenneth had personally grown, cut, planed, dried, and installed on the subject premises — that Kenneth told Franklin to do it Kenneth's way or move out, and that Franklin relented and performed the maintenance as his father demanded. It was undisputed that Franklin, 45 years old at the time of trial, had no prior criminal record other than the one guilty plea for marijuana possession arising out of this matter. It was undisputed that Kenneth, 65 at the time of trial, had no knowledge of marijuana being on the subject property and that, if he had standing to contest the forfeiture, he would be an innocent owner able to invoke the innocent owner exception to forfeiture. Yet the trial court found that Kenneth did not have standing to contest the forfeiture as an innocent owner, finding instead that Kenneth had exercised no dominion or control over the subject property. It found that "people engaged in drug trafficking

often attempt to disguise their interests in property by placing title in someone else's name" even though there is not and never has been any claim of any illegal activity on the subject property by Franklin or Kenneth Withrow in the eleven years prior to the incident that gave rise to the forfeiture action. It is beyond implausible that, in 1981 in anticipation of finding a marijuana patch eleven years later, that Franklin would place the title to "his" home in his father's name. The trial court then connected the titling of property in a strawman's name to avoid seizure for trafficking with the evidence that Franklin had "lost" a home in a divorce many years earlier as if — assuming arguendo that Franklin had wanted his father to own the property to avoid losing it in a divorce — that such intent constitutes grounds for establishing a strawman claim related to drug trafficking.

B. Forfeiture

The trial court held, inconsistently, that Franklin Withrow was seen on property a mile distant from his residence harvesting marijuana, that the marijuana was found on the subject property when the raid occurred, and that "growing marijuana is an activity sufficient to subject the property on which cultivation occurs to civil forfeiture under section 881(a)(7)." It was not disputed that the seized marijuana was not grown on the subject property, but on other property a mile away. Further, the express testimony of the only person other than Franklin to testify on the issue of manufacturing (Franklin having testified that he had the marijuana for his own personal use — less than a year's supply for one person) testified for the Government: (a) that in all manufacturing operations there are records of

sales and other financial records located; and (b) but that in this instance there were no such records located. Thus the concept that Franklin was using a mounted deer head to dry a single marijuana plant grown a mile away in plain view of a State Highway as manufacturing marijuana is beyond incredible. This is a case of a person who simply possessed a small amount of marijuana for his own personal use on property bought, paid for, built by and controlled by his father.

C. Excessive Fine

The parties stipulated that the property sought to be forfeited was valued at $121,000. The trial court had evidence before it at trial — all from law enforcement officers — that the value of the marijuana seized was, variously: (a) essentially worthless as a male plant; (b) worth $500; or (c) worth $3,500 if it had been a female plant (there was no evidence that it was a female plant, only that if it had been, the valuation would have been such). The trial court chose to accept the highest valuation of $3,500. The crime for which Franklin Withrow is guilty is simple possession of 9 ounces of marijuana. Under applicable Georgia law, no fine at all is allowed for the offense.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS CONFLICT WITH THIS COURT'S DECISIONS REGARDING THE STANDARDS TO BE APPLIED IN DETERMINING WHETHER A FORFEITURE CONSTITUTES AND EXCESSIVE FINE.

The forfeiture sought, under section 881(a)(7), is subject to review for excessiveness under the excessive fines clause of the Eighth Amendment. *Austin v. United States*, 509 U.S. 602 (1993). The forfeiture of real property worth $121,000 for the presence on the property of 22.9 ounces (the approximate weight of two cartons of cigarettes) of undried marijuana, marijuana stalks, marijuana roots, etc. valued, at the most at $3,500 (or 2% of the property value) is clearly excessive.

> The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. (Cits) It is in the light of the extensive criminal activities which petitioner apparently conducted . . . that the question whether the forfeiture was "excessive" must be considered. * * * [A] punitive forfeiture violates the Excessive Fines

> Clause if it is grossly disproportional to the gravity of a defendant's offense. * * * Whatever his other vices, [the Claimant] does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader.

United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028 (1998).

II.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS CONFLICT WITH THIS COURT'S DECISIONS REGARDING WHETHER FORFEITURE IS AUTHORIZED UNDER THE STATUTE.

> "And under the Sentencing Guidelines, **the maximum sentence that could have been imposed on respondent** was six months, while the maximum fine was $5,000."

United States v. Bajakajian (emphasis added) (decided by this Court after rejection by the Court of Appeals of the Excessive Fines claim of Petitioners).

The trial court implicitly found that the Sentencing Guidelines would tend to make forfeiture inapplicable under the statute, but expressly found that the Sentencing Guidelines were irrelevant and "even were the sentencing guidelines relevant to this issue, the Court concludes that

the question [Excessive Fines] should be answered by reference to the **possible sentences assignable to the offense** under the guidelines, **rather than the sentencing range assignable to the instant claimant**." (emphasis added). As noted above, neither the trial court not the Court of Appeals had the benefit of this Court's decision in *Bajakajian* when those determinations were made.

III.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS CONFLICT WITH THE UNITED STATES CONSTITUTION, ARTICLE III AND THE COURT OF APPEALS' OTHER DECISIONS REGARDING WHAT CONSTITUTES STANDING TO ASSERT AN INNOCENT OWNER DEFENSE TO FORFEITURE.

The determination that an elderly man who pays for the purchase of land, pays for the material for the construction of a home, provides some of the labor for the construction of a home, oversees and dictates maintenance of the home, is acknowledged openly and publicly by the resident grown son as the owner of the home, is the record title owner of the home, is the record tax payer for the property, does not have standing to contest forfeiture of the property is so violative of law and policy that it must be reviewed. In *United States v. Palmetto Drive*, 928 F.2d 373 (11th Cir. (Fla.) 1991) the Court of Appeals held that in such cases standing to assert an innocent owner defense applies. Standing is a threshold issue established as a requirement under Article III of the United States Constitution. Under applicable law, the uncontroverted facts set forth above establish standing.

CONCLUSION

Kenneth Withrow did all that could be done to control his land and building that he bought paid for, and built a dozen years earlier with his own money. His son, Franklin, lived on the property. Franklin found a patch of marijuana growing along the roadside of a state highway a mile from the property and took some home to dry. His removal of the marijuana from the roadside was captured on videotape and the property was raided. Found was 22.9 ounces of undried marijuana, stems, roots, and leaves with a value of no more than 2% of the value of the property sought to be forfeited. The accused, Franklin Withrow, was not subject to a penalty of more than one year in prison for the offense. Kenneth Withrow has standing as an innocent owner to contest the forfeiture. For all of the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JUNE 16, 1997

United States Court of Appeals
For the Eleventh Circuit

No. 96-9237
Non-Argument Calendar

D.C. Docket No. 4:93-CV-335

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROUTE 7, BOX 7091, CHATTSWORTH, GEORGIA, and all appurtenances thereon, being approximately five acres of land lot 209 in the 26th district and 2nd section of Murray County,

Defendant,

KENNETH G. WITHROW, clm,
FRANKLIN WITHROW, clm,,

Claimants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

Before TJOFLAT, BIRCH and CARNES, Circuit Judges.

Appendix A

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that claimants-appellants pay plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 16, 1997
For the Court: Miguel J. Cortez, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: MAR 18 1999

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION DATED AND FILED SEPTEMBER 20, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CIVIL ACTION
4:93-cv-335-HLM

United States of America,

Plaintiff,

v.

Route 7, Box 7091, Chatsworth, Georgia,

Defendant,

v.

Kenneth G. Withrow,

Claimant,

Franklin Withrow,

Claimant.

Appendix B

ORDER

This civil forfeiture action is before the Court (1) on Claimants' Motion for Reconsideration and (2) for further Findings of Fact and Conclusions of Law.

In the instant case, Plaintiff contends that the defendant real property was used by Claimant Franklin Withrow to facilitate the manufacture of marijuana and that the defendant property is, therefore, subject to forfeiture under the provisions of 21 U.S.C. § 881(a)(7). On February 12, the Court held a non-jury trial to determine whether the statutory requirements of 21 U.S.C. § 881(a)(7) had been met. After receipt of the parties' proposed findings and conclusions, the Court so found. The Court, however, did not order the defendant property forfeited because the parties had reserved a constitutional issue for a second hearing in the event the Court found forfeiture appropriate under the statute.

That issue is Claimants' contention that forfeiting the defendant property is an "excessive fine" prohibited by the Constitution. On September 11, 1996 the Court heard evidence pertaining to this issue. The matter has been briefed and is ready for disposition. Also before the Court is Claimants' Motion for Reconsideration of the Court's initial Findings of Fact and Conclusions of Law.[1]

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1. In its initial Findings and Conclusions, the Court inadvertently noted that the parties has reserved the Claimants' "double jeopardy" claim. This was error. The issue before the Court concerns the excessive fines clause: no double jeopardy issue has been raised.

Appendix B

I. Motion for Reconsideration

1. In their Motion for Reconsideration, Claimants contend that the Government premised the instant case on the:

> manufacture — not distribution — of two plants plus up to eleven ounces from a third plant on the subject property. The Government further identified twelve plants a mile away that were allegedly being tended by Franklin Withrow . . . [which increases] the alleged manufacturing to fifteen plants. . . . There were no allegations of sale or distribution related to the forfeiture.

Motion for Reconsideration at 5-7. Claimants argue, therefore, that the offense of which Franklin Withrow is accused is not an offense subject to punishment by more than one year's imprisonment because he would not have received a sentence of more than a year if he had been convicted of manufacturing 15 marijuana plants. United States Sentencing Commission, *Guidelines Manual*, § 2D1.1(a)(3) and § 5(a) (Nov. 1992).

2. The Court concludes that Claimants are correct that 21 U.S.C. §881(a)(7) only authorizes forfeiture of real property used to commit "a violation of [28 U.S.C. 841] punishable by more than one year's imprisonment." Claimants, however, are incorrect that Claimant Franklin Withrow's behavior does not satisfy this prerequisite. This is so for several reasons.

3. First, the Court concludes that the question of whether an offense is "punishable" by imprisonment for more than a year is answered by reference to the possible punishments *authorized* by statute, rather than by the Sentencing Guidelines' treatment of a particular crime. *United States v. One Parcel of Real Property*, 960 F.2d 200, 205 (1st Cir. 1992) (implying that statutory authorization, rather than Sentencing Guidelines, is determinative: "since violations of section 841(a) are felonies punishable by more than one year in prison, *see* 21 U.S.C. § 841(b) (Supp. 1988), we also hold that growing marijuana . . . is an activity sufficient to subject the property on which cultivation occurs to civil forfeiture under section 881(a)(7)"). From 1993 to the current date, 21 U.S.C. § 841 has provided that "it shall be unlawful for any person knowingly or intentionally to manufacture . . . a controlled substance. . . . In the case of less than 50 kilograms of marihuana . . ., such person shall . . . be sentenced to a term of imprisonment of not more than 5 years." 21 U.S.C. § 841(a)(1) and (b)(1)(D). Thus, the statute provides that manufacturing even minimal amounts of marijuana is "punishable" by more than one year in prison.

4. Second, even were the Sentencing Guidelines relevant to this issue, the Court concludes that the question should be answered by reference to the possible sentences assignable to the offense under the Guidelines, rather than the sentencing range assignable to the instant Claimant — a range which is determined in part by reference to the instant Claimant's criminal history. The Sentencing Guidelines provide that a defendant convicted of manufacturing marijuana must receive at least a base offense

level of six. USSG § 2D1.1(a)(3). Six base offense level points result in sentences ranging from 0 to 18 months depending on a claimant's criminal history score. Thus, even considering the strictures of the Guidelines, manufacturing small amounts of marijuana is "punishable" by imprisonment for over a year.

5. Finally, even were the issue determined by the actual sentencing guideline range assignable to the instant Claimant Franklin Withrow, forfeiture would still be in order. The Court finds as fact that Claimant Franklin Withrow manufactured 22.9 ounces or some 649 grams of marijuana in 1993. The Court concludes that had Claimant Franklin Withrow been prosecuted for his offense in either 1993 or currently, his offense is "punishable" by more than one year in prison and remains a felony even if the Sentencing Guidelines would allow a sentence of less than one year.

6. Claimants' also move the Court to reconsider its prior findings because the Government allegedly failed to give pre-seizure notice. The Court simply notes that no evidence exists in the record indicating that the property has been seized in a constitutionally prohibited manner. *See United States v. Good Real Property*, 126 L.Ed. 2d 490 (1993).

Appendix B

II. Excessive Fines

A. Findings of Fact[2]

1. This action seeks a civil forfeiture against the real property titled in the name of Kenneth Withrow located at Route 7, Box 7091, Chatsworth, Georgia, and all buildings and appurtenances thereon, being approximately five acres of Land Lot 209 in the 26th district and 2nd section of Murray County. The defendant property sits atop Fort Mountain in Murray County and has a house and garage located on it.

2. The defendant property has a fair market value of $121,000.

3. Claimant Franklin Withrow and his wife Sharon Moore moved into the residence on the defendant real property in 1981. Sharon and Franklin Withrow lived at the residence until their separation in 1989.

4. Since the early 1980's, United States Forest Service Special Agent Jim Crowe and other Forest Service agents have received information from other law enforcement agents and civilians that Franklin Withrow was growing and selling marijuana in the Murray County area.

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2. Some of the factual findings and legal conclusions below are identical to previously made findings and are reiterated for purposes of clarity. The Court has also made findings below that are similar, but not identical, to previously made factual findings. These findings were necessary to evaluate the excessive fines issue that has only recently come before the Court.

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5. Since approximately 1983, Special Agent Jim Crowe and other Forest Service agents have discovered numerous patches of marijuana growing near the residence of Franklin Withrow.

6. In 1989, Sharon Moore discovered marijuana in a cooler in the garage on the defendant property and a garbage bag full of marijuana on top of plywood lying on the ceiling rafters in the unfinished addition to the house. She hid the garbage bag of marijuana and was soon confronted by Franklin Withrow who demanded to know what she had done with it. She retrieved the bag and threw it on the floor, scattering the marijuana, and then left the property for the last time.

7. From the quantity and packaging of this marijuana, the Court finds that Claimant Franklin Withrow used the defendant property to store and dry marijuana that he had previously grown. From the quantity of the marijuana, the Court also finds that Claimant Franklin Withrow did not grow this marijuana for personal use, but instead grew it with an intent to distribute.

8. In the early summer of 1993, Forest Service agents, while flying in a helicopter, observed several small patches of marijuana near the residence of Claimant Franklin Withrow.

9. Subsequently, Forest Service Special Agent Jim Crowe and other Forest Service agents set up a surveillance camera in the patches. On one occasion, when Agent Crowe and another Forest Service agent approached the marijuana

patches to service the surveillance camera, they observed a motorcycle that belonged to Franklin Withrow sitting in a trail that led to the marijuana patches. The agents observed Franklin Withrow return to his motorcycle from the area where the marijuana patches were located carrying a short-handled hoe. The agents then followed the trail of footprints and impressions left by Franklin Withrow through the woods to a freshly watered marijuana patch.

10. Claimant Franklin Withrow was cultivating these marijuana plants.

11. On August 30, 1993, Forest Service agents placed a surveillance camera near another marijuana patch located near Franklin Withrow's residence. This marijuana patch was west of the defendant real property.

12. On September 7, 1993, agents checked the surveillance film, which showed Franklin Withrow on or about September 2, 1993, fertilizing and harvesting the marijuana plants in the patch near his residence. Franklin Withrow was carrying granular fertilizer in a plastic milk jug. He was wearing a blue short-sleeved shirt with a Polo logo on the front and pink shorts.

13. Claimant Franklin Withrow was cultivating these marijuana plants.

14. On September 8, 1993, agents of the Georgia Bureau of Investigation obtained a state search warrant for Franklin Withrow's residence on the defendant real property and an arrest warrant for Franklin Withrow.

Appendix B

15. On September 8, 1993, GBI agents arrested Claimant Franklin Withrow for manufacturing marijuana and law enforcement agents executed the search warrant at Franklin Withrow's residence.

16. While searching the residence on the defendant real property, agents seized marijuana plants hanging from a mounted deer head in the living room, several layers of drying marijuana with each layer separated by sheets of newspaper on a chair in the dining room, a plastic bag of marijuana in an upstairs room in the residence, two marijuana plants growing in the yard of Franklin Withrow's residence, a large twenty-five pound box of Miracle Grow fertilizer, a plastic milk jug containing granular fertilizer, a blue short-sleeved shirt with a Polo logo and pink Pacific Coast Highway shorts. The agents also located the motorcycle that Franklin Withrow had previously used to travel to the marijuana patches east of the defendant property and the short-handled hoe that he had used to cultivate those marijuana plants.

17. The Court finds that Claimant Franklin Withrow used the house to dry, store and package marijuana that he had previously grown. Claimant Franklin Withrow also used the property to store the fertilizer, watering jug and hoe that he used to cultivate his marijuana plants. He used the property to store the vehicle he used to move to and from marijuana plants that he grew on other people's property. Claimant Withrow also used the property to grow marijuana. From the quantity of marijuana, the evidence of individual packaging of the marijuana and the fact that Claimant had grown marijuana in the past with the intent to distribute it,

the Court concludes that Claimant grew his marijuana with the intent to distribute it.

18. The marijuana seized from Claimant's house, property and his cultivated patch weighed 22.9 ounces. Its street market value was approximately $3500.00. The marijuana seized from Claimant's marijuana patches was about one-half the total marijuana seized with the remainder coming from various locations in the house and on the land of Franklin Withrow.

19. On or about November 17, 1993, Franklin Withrow was indicted by a grand jury in the Superior Court of Murray County, Georgia for unlawfully manufacturing marijuana and unlawfully possessing marijuana.

20. Claimant Franklin Withrow was incarcerated for a nine month period of time after pleading guilty to possession of marijuana.

21. Claimant Franklin Withrow resided on the defendant real property at all times since the house was built in 1981 except for his period of incarceration following his November 1993 conviction for possessing marijuana.

22. Claimant Kenneth Withrow has never exercised any dominion or control over the defendant property and is merely a record title holder.[3] Claimant Franklin Withrow,

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3. The Court notes that in its June 6 Order, the Court found that Kenneth Withrow was the "record title owner." This was error. The Court hereby modifies that factual finding to reflect that Kenneth Withrow was the "record title holder" rather than the "record title owner."

who has always exercised ownership rights to the defendant property and held himself out to the world to be the owner of the defendant property, is the true owner of the defendant property.

B. Conclusions of Law

1. Notwithstanding the fact that Franklin Withrow limited his claim to the defendant property to a usufruct or tenancy at will, interest which is now defeated in light of the failure of Kenneth Withrow to establish standing, Franklin Withrow is in fact the true owner of the defendant property and has standing in that capacity.

2. On the basis of the aforementioned factual findings, the Court finds that Franklin Withrow used the defendant real property to facilitate his manufacture and distribution of marijuana in 1993. 21. U.S.C. § 881(a)(7).

3. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

4. "[T]he Excessive Fines Clause of the Eighth Amendment applies to *in rem* civil forfeiture proceedings under 21 U.S.C. § 881(a)(7)." *United States v. One Parcel Property*, 74 F.3d 1165, 1170 (11th Cir. 1996).

5. "[T]he appropriate inquiry with respect to the Excessive Fines Clause is, and is only, a proportionality test." *Id.*

6. "That is, a court must ask: Given the offense for which the owner is being punished, is the fine (imposed by civil forfeiture) excessive? While the core of proportionality review is a comparison of the severity of the fine with the seriousness of the underlying offense, it would be futile to attempt a definitive checklist of relevant factors. The relevant factors will necessarily vary from case to case." *Id.* at 1172.[4]

7. Claimant Franklin Withrow has manufactured marijuana with the intent to distribute it. He is, therefore, the most culpable of all types of drug offenders. He is not merely a "user." He is not merely a "distributor." He is the

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4. The Court notes that the instant Complaint does not clearly identify whether this forfeiture action is premised merely upon allegations of marijuana manufacturing or whether it is also based on allegations of marijuana distribution. Prior to this point in the litigation, this distinction has made no material difference because manufacturing marijuana alone is sufficient to satisfy the requirements of 21 U.S.C. § 881(a)(7). In light of his constitutional argument, however, Claimant Franklin Withrow contends that this pleading issue is significant because distribution allegations bear on the "seriousness" of the conduct justifying forfeiture. The Court, nevertheless, concludes that this issue is of no moment. Regardless of whether "distribution" was properly pled, Claimant Franklin Withrow's intended use of his marijuana is a factual issue which is one "factor" in the totality of the circumstances which must be evaluated by the Court in determining the seriousness of his conduct. In other words, "possession with the intent to distribute" is arguably unavailable to the Government to serve as the predicate crime justifying forfeiture, but the Court's objective evaluation of the seriousness of Claimant Franklin Withrow's conduct is an entirely distinct analysis.

original link in the distribution chain without whom the illicit substance would not exist. His crime, therefore, is very "serious."[5]

8. Defendant contends, nonetheless, that his activities are not sufficiently serious to warrant forfeiting property worth $121,000 because in the instant case the amount of marijuana he manufactured was small and not particularly valuable. The Court disagrees. To begin, the Court concludes that manufacture of 22.9 ounces of marijuana was sufficiently serious, in and of itself, to warrant the instant forfeiture. *See* 21 U.S.C.A. § 841(b)(1)(D) (West Supp. 1993) ("In the case of less than 50 kilograms of marihuana . . . such person shall . . . be sentenced to a term of imprisonment [and] a fine not to exceed . . . *$250,000.*") *Austin v. United States*, 509 U.S. 602, 620 (1993) (recognizing that Congress considered drug crimes sufficiently serious to warrant forfeitures *in addition* to statutorily authorized fines: "Congress recognized that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs.").

9. Secondly, the obvious sophistication of Claimant Franklin Withrow's manufacturing techniques supports the inference that he was an experienced marijuana grower. This conclusion is also bolstered by the Court's finding that Claimant Franklin Withrow manufactured marijuana in

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5. His role is also more difficult for law enforcement to detect and eliminate because, unlike most distributors, he need not buy his product from any source.

1989. Thus, he posed a greater danger to society than someone who had merely grown one batch of marijuana.[6]

10. The Court concludes, therefore, that in the instant case forfeiture of Claimant Franklin Withrow's property valued at $ 121,000, is not an excessive fine.

III. Conclusion

Accordingly, the Court **denies** Claimants' Motion for Reconsideration, **finds** for Plaintiff and against defendant real property and Claimants Kenneth and Franklin Withrow and **orders** defendant property forfeited to Plaintiff United

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6. The Court feels compelled to make explicitly clear that it does not consider Claimant's conduct in 1989 to be properly considered as criminal activity which justifies some level of forfeiture in and of itself. In other words, the Court is not "adding" Claimant's conduct in 1989 to his conduct in 1993 to reach the conclusion that the two offenses together are sufficiently serious to justify forfeiture. Such a rationale would be improper because Claimant Franklin Withrow's conduct in 1989 was not properly pled. Instead, the 1989 incident is relevant only for what it reveals about Claimant Franklin Withrow's conduct in 1993. It is a "factor" or "circumstance" bearing on the seriousness of Claimant's conduct in 1993. Claimant's prior conduct reveals that his 1993 conduct is part of a pattern. The Court concludes, therefore, that Claimant Franklin Withrow's conduct in 1993 is actually more serious than it would have been if he was new to the world of illicit drugs and had not previously demonstrated an affinity for marijuana, a willingness to break the law, and a proficiency for doing so. The Court notes that the notion of enhancing sentences based on criminal history is based on a similar rationale.

States of America; and, directs that judgment be entered in accordance with this order.

IT IS SO ORDERED, this the 20th day of September, 1996.

s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION DATED, FILED AND ENTERED SEPTEMBER 20, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CIVIL ACTION NO.
4:93-cv-335-HLM

UNITED STATES OF AMERICA

Plaintiff

vs.

ROUTE 7, BOX 7091, CHATSWORTH GEORGIA, and all appurtenences thereon, be approximately five acres of land Lot 209 in the 26th district and 2nd section of Murray County

Defendant

JUDGMENT

This action having come before the court, Honorable Harold L. Murphy, United States District Court Judge presiding, for trial, the issues having been tried and a decision rendered, finding for the United States of America and against the defendant real property and Claimants Kenneth and Franklin Withrow, it is

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Ordered and Adjudged that the plaintiff UNITED STATES OF AMERICA receive the forfeited property ROUTE 7, BOX 7091, CHATSWORTH, GEORGIA, and all appurtenences thereon, being approximately five acres of land, Lot 209 in the 26th District and 2nd Section of Murray County.

Dated at Rome, Georgia, this 20th day of September, 1996.

Luther D. Thomas, Clerk

By: s/ [illegible]
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION DATED JUNE 5, 1996 AND FILED JUNE 6, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CIVIL ACTION
4:93-cv-335-HLM

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROUTE 7, BOX 7091, CHATSWORTH, GEORGIA,

Defendant,

v.

KENNETH G. WITHROW,

Claimant,

FRANKLIN WITHROW,

Claimant.

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ORDER

This is a civil forfeiture action filed against the defendant real property being approximately 5 acres consisting of all that tract or parcel of land, together with all buildings and appurtenances, lying and being in Land Lot 209 in the 26th District and 2nd Section of Murray County, Georgia with mailing address Route 7, Box 7091, Chatsworth, Georgia. Plaintiff contends that the defendant real property was used by Franklin Withrow to facilitate his manufacture of marijuana and that the defendant property is subject to forfeiture under the provisions of 21 U.S.C. § 881(a)(7). Plaintiff further contends that Franklin K. Withrow is the true owner of the defendant property and that claimant Kenneth Withrow is merely a nominal owner.

Kenneth Withrow contends he is the owner of the property and is an innocent owner.

Franklin Withrow contends his father, Kenneth Withrow, is the owner of the property and that he, Franklin Withrow, has the rights of a tenant at will in the property.

The case was tried to the Court without a jury. After considering the evidence and submissions of the parties the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This action seeks a civil forfeiture against the real property titled in the name of Kenneth Withrow located at

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Route 7, Box 7091, Chatsworth, Georgia, and all buildings and appurtenances thereon, being approximately five acres of Land Lot 209 in the 26th district and 2nd section of Murray County. The defendant property sits atop Fort Mountain in Murray County and has a house and garage located on it.

2. Since the early 1980's, United States Forest Service Special Agent Jim Crowe and other Forest Service agents have received information from other law enforcement agents and civilians that Franklin Withrow was growing and selling marijuana in the Murray County area.

3. Since approximately 1983, Special Agent Jim Crowe and other Forest Service agents have discovered numerous patches of marijuana growing near the residence of Franklin Withrow.

4. In the early summer of 1993, Forest Service agents, while flying in a helicopter, observed several small patches of marijuana near the residence of Claimant Franklin Withrow.

5. Subsequently, Forest Service Special Agent Jim Crowe and other Forest Service agents set up a surveillance camera in the patches. On one occasion, when Agent Crowe and another Forest Service agent approached the marijuana patches to service the surveillance camera, they observed a motorcycle that belonged to Franklin Withrow sitting in a trail that led to the marijuana patches. The agents observed Franklin Withrow return to his motorcycle from the area where the marijuana patches were located carrying a

short-handled hoe. The agents then followed the trail of footprints and impressions left by Franklin Withrow through the woods to a freshly watered marijuana patch.

6. On August 30, 1993, Forest Service agents placed a surveillance camera near another marijuana patch located near Franklin Withrow's residence. This marijuana patch was west of the defendant real property.

7. On September 7, 1993, agents checked the surveillance film, which showed Franklin Withrow on or about September 2, 1993, fertilizing and harvesting the marijuana plants in the patch near his residence. Franklin Withrow was carrying granular fertilizer in a plastic milk jug. He was wearing a blue short-sleeved shirt with a Polo logo on the front and pink shorts.

8. On September 8, 1993, agents of the Georgia Bureau of Investigation obtained a state search warrant for Franklin Withrow's residence on the defendant real property and an arrest warrant for Franklin Withrow.

9. On September 8, 1993, GBI agents arrested Franklin Withrow for manufacturing marijuana and law enforcement agents executed the search warrant at Franklin Withrow's residence.

10. While searching the residence on the defendant real property, agents seized marijuana plants hanging from a mounted deer head in the living room, several layers of drying marijuana with each layer separated by sheets of newspaper on a chair in the dining room, plastic bags of

marijuana in various rooms in the residence, two marijuana plants growing in the yard of Franklin Withrow's residence, a large twenty-five pound box of Miracle Grow fertilizer, a plastic milk jug containing granular fertilizer, a blue short-sleeved shirt with a Polo logo and pink Pacific Coast Highway shorts. The agents also located the motorcycle that Franklin Withrow had previously used to travel to the marijuana patches east of the defendant property and the short-handled hoe that he had used to cultivate those marijuana plants.

11. Franklin Withrow used the defendant real property to facilitate his manufacture of marijuana.

12. On November 17, 1993, the United States filed a verified complaint for forfeiture of the defendant real property pursuant to 21 U.S.C. § 881(a)(7) as a result of Franklin Withrow's use of the property to facilitate his manufacture and distribution or both of marijuana.

13. Claimant Kenneth Withrow, father of Franklin Withrow, filed a verified claim to the defendant real property and answer to the complaint claiming that he owns the defendant real property.

14. Franklin Withrow also filed a verified claim to the defendant real property and answer to the complaint. Franklin Withrow claims that he is not the true owner of the defendant real property, but claims only to have a usufruct interest in the property, i.e., he claims to be a tenant at will.

15. Although Kenneth Withrow is the record titleholder of the defendant real property, he has never exercised any dominion or control over the property since shortly after it was purchased.

16. Sharon Ruth Florence, f/k/a Sharon Moore Withrow was married to Franklin Withrow from March 1981 until October 1990.

17. Sharon Moore testified that, after discussions with Clyde and Lucretia Crouse — who lived near the defendant property and wanted neighbors in that remote area — she initiated the negotiations with Lucretia Crouse's uncles, Red and Sparky Ernest, which led to the purchase of the defendant property.

18. In 1981 the defendant real property was purchased for $15,000 and a house was built on the property.

19. Sharon Moore was married to Franklin Withrow when she and Franklin Withrow moved into the residence on the defendant real property in 1981. She and Franklin Withrow lived at the residence until their separation in 1989.

20. Sharon Moore testified that she and Franklin Withrow paid $2000 toward the purchase of the defendant real property and borrowed the remaining $12,000 of the purchase money from Kenneth Withrow.

21. Kenneth Withrow paid the purchase money for the defendant property, after cashing in a certificate of deposit, by check to Red and Sparky Ernest in the amount of $15,000.

22. Sharon Moore testified that she understood the monetary contribution of Kenneth Withrow toward the purchase of the property to be a loan that would be repaid by Sharon and Franklin Withrow plus the interest that Kenneth Withrow lost by cashing in the certificate of deposit.

23. Sharon Moore testified that she attempted to repay Kenneth Withrow the money used to purchase the defendant real property, plus the interest that Kenneth Withrow had lost by cashing in the certificate of deposit, either in monthly installments of $400 per month for three years or in a lump sum cash payment. She said Kenneth Withrow refused repayment, stating that he did not want to attract the attention of the IRS with any incoming cash payments.

24. Sharon Moore testified that she and Franklin Withrow always held themselves out to the world to be the owners of the defendant real property.

25. Kenneth Withrow resides in Gilmer County, Georgia, about fifteen miles from the defendant real property.

26. Kenneth Withrow has never lived on the defendant real property.

27. Kenneth Withrow visited the property only several times a year with weeks or months passing between visits. When he visited, he usually sat around and talked with Franklin Withrow and sometimes walked around in the woods to look at the spring or the ginseng Franklin Withrow was growing.

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28. Sharon Moore testified that Kenneth Withrow only visited the defendant property about five times per year and that he never inspected the defendant property or asked any questions about the maintenance or repair of the house.

29. Franklin Withrow has lived on the defendant real property rent free since the house was built on the property in approximately 1981.

30. On or about November 17, 1993, Franklin Withrow was indicted by a grand jury in the Superior Court of Murray County, Georgia for unlawfully manufacturing marijuana and unlawfully possessing marijuana.

31. Franklin Withrow was incarcerated for a nine month period of time after pleading guilty to possession of marijuana.

32. Upon his release from prison on the marijuana conviction, Franklin Withrow immediately moved back into the house on the defendant property.

33. Franklin Withrow has resided on the defendant real property at all times except for his period of incarceration following his November 1993 conviction for possessing marijuana.

34. While Franklin Withrow was incarcerated for the marijuana possession conviction, Franklin Withrow's girlfriend, whom Kenneth Withrow knew as "Doris," lived rent free on the defendant real property.

35. Kenneth Withrow has little knowledge of who is residing on the defendant property with Franklin Withrow at any given time.

36. Kenneth Withrow testified at trial that he believed that "Doris" still lived on the defendant property part of the time, however, Franklin Withrow testified that she does not.

37. Kenneth Withrow testified that there has never been any rental agreement or lease between him and Franklin Withrow nor has Franklin Withrow ever paid any rent for his use and enjoyment of the defendant real property.

38. Franklin Withrow pays all of the utilities for the house and defendant real property and has done so since the house was built.

39. Sharon Moore testified that she and Franklin Withrow paid property taxes for the defendant real property and that Franklin Withrow never paid those expenses or reimbursed them for the payments.

40. Murray County property tax records show that, although Murray county billed taxes, tax adjustments, and penalties on the defendant real property to Kenneth Withrow as record titleholder of the defendant real property, Franklin Withrow paid the taxes, tax adjustments, and penalties.

41. Kenneth Withrow testified that Franklin Withrow and Sharon paid the property taxes and that he believed the source of the money to be from their own monies or from

rent received from the Anheuser-Busch Corporation for use of a tower on the property during a two to three year period.

42. Franklin Withrow's testimony conflicted with his father's testimony regarding payment of the property taxes because Franklin Withrow testified at trial that his father gave him cash with which to pay the taxes.

43. Sharon Moore testified that she and Franklin Withrow paid the homeowner's insurance premiums for the defendant real property by check and that Kenneth Withrow never paid these expenses or reimbursed them for the payments.

44. At trial, Kenneth Withrow testified that he never directly paid the insurance premiums nor reimbursed Franklin Withrow and that instead, Franklin Withrow and Sharon paid the premiums.

45. Franklin Withrow and Sharon had a homeowner's insurance policy in their names with State Farm & Casualty Company as owners of the property, which provided homeowner's insurance coverage for the defendant real property.

46. State Farm Insurance Agent Randy Dean testified that State Farm's policy is to only provide straight homeowner's insurance coverage, type HO-3, the type obtained by Franklin Withrow and Sharon, to individuals who own the insured property. He testified that State Farm provides a different "renters" type of insurance coverage, Type HO-4, to individuals who occupy but do not own the insured property.

47. Agent Dean testified that he had no contact with Kenneth Withrow regarding the defendant property and that Franklin Withrow never indicated to him that anyone other than Franklin Withrow and Sharon owned the defendant property.

48. On December 5, 1981, Franklin Withrow filed an insurance claim on his homeowner's insurance policy with State Farm Fire for damage to the residence on the defendant real property caused when a frozen water pipe burst.

49. On November 12, 1986, Franklin Withrow filed an insurance claim on his homeowner's insurance policy with State Farm for loss of firearms and jewelry when the residence on the defendant real property was burglarized.

50. A brick mason and a carpet layer each testified that they performed work at the defendant real property and that they did so to Franklin Withrow's specifications and that Kenneth Withrow was not involved in hiring them to perform the work.

51. Carlton Dwight Scott, a brick mason, testified that Franklin Withrow contracted him to lay the foundation for Franklin Withrow's house on the defendant real property, a garage, and additions to the house and sidewalk.

52. Kenneth Withrow testified at trial that he paid Mr. Scott for laying the blocks for the foundation.

53. Mr. Scott testified that all work that he performed on the defendant real property was done to Franklin

Withrow's specifications, that he never dealt with Kenneth Withrow regarding work on the defendant real property, and that he was paid for his work on the property by Franklin Withrow.

54. Amos Green, a carpet layer, testified that, shortly after the house on the defendant real property was built, at Franklin Withrow's request, he laid and repaired some carpet in Franklin Withrow's house on the defendant property. Green further testified that Franklin Withrow hired him and that he did the work for Franklin Withrow and never dealt with Kenneth Withrow regarding the work.

55. Sharon Moore testified that when the Budweiser plant was being built in Cartersville, the Anheuser-Busch Corporation leased a tower located on the defendant real property for communication purposes and paid her and Franklin Withrow rent biannually. Kenneth Withrow also testified that Franklin Withrow received the rental payments for the use of the tower.

56. Franklin Withrow signed an agreement for service with the Fort Mountain Estates Volunteer Fire Department that stated that Franklin Withrow was the owner of the defendant real property.

57. The claimants offered into evidence checks and invoices indicating Kenneth Withrow's purchase of construction materials such as nails, pipe, gravel, and concrete. Kenneth Withrow testified that, as to many of the checks, he was not sure what they were for and could only be sure that they were for construction materials if the

checks so indicated or if they were written to a building supply company. Kenneth Withrow testified that these supplies were for the construction of the house on the defendant property, however, nothing on the checks or invoices specifically indicates their relationship to the defendant property.

58. Kenneth Withrow testified that, after the house was constructed, a garage was built at Franklin Withrow's request, a large addition was built at Franklin Withrow's and Sharon's request, and exposed rafters were added at his son's request.

59. Sharon Moore testified that she and Franklin Withrow purchased $9600 worth of building materials for the construction of the defendant property, including water pumps and pressure treated lumber.

60. Kenneth Withrow testified that Franklin Withrow and Sharon purchased pressure treated lumber, which was used for a walkway and deck.

61. Sharon Moore testified that, during 1989, she discovered marijuana in a cooler in the garage on the defendant property and a garbage bag full of marijuana on top of plywood lying on the ceiling rafters in the unfinished addition to the house. She testified that she hid the garbage bag of marijuana and was soon confronted by Franklin Withrow who demanded to know what she had done with it. She testified that she retrieved the bag and threw it on the flood, scattering the marijuana, and then left the property for the last time.

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62. Franklin Withrow testified that he was married once before his marriage to Sharon Moore. He testified that the house that he owned during his first marriage was "taken in the divorce" from his first wife.

63. Franklin Withrow testified that the house that was later taken from him in his first divorce was originally built by Kenneth Withrow for Franklin Withrow's grandparents. He testified that he and Kenneth Withrow remodeled the house when Franklin Withrow moved back from college and that Kenneth Withrow gave the house to Franklin Withrow.

64. Sharon Moore testified that, on one occasion during their marriage, Franklin Withrow told her that he had lost a house during his first divorce and that it was not going to happen again. She also testified that, after she had initiated divorce proceedings, Franklin Withrow told her that he would burn the house on the defendant property before he would let her have it.

65. Sharon Moore testified that she did not pursue an ownership interest in the defendant property during her divorce from Franklin Withrow, but instead sought and received a monetary payment from Franklin Withrow in satisfaction of property division.

66. At trial the Court asked Kenneth Withrow, "Why did you let your son live in the house all of these years rent free, if it was your house?" He answered "Judge that's a good question."

67. Kenneth Withrow further testified that he had let his other son, Johnny, live at home with Kenneth Withrow and his wife all of Johnny's life and that he felt like he owed it to Franklin Withrow to also give him a place to live.

68. Kenneth Withrow testified that he had cut "every stick" of wood in the house on the property except for the window molding which he could not cut. He testified that the wood came from trees grown on his farm that had been in his family since his grandfather. That he had purchased the land by assigning a $15,000 certificate of deposit. He introduced into evidence a carbon copy of the original assignment of the $15,000 CD, the original bank statement showing the deposit just prior to the closing and the withdrawal of $15,000 on the day of the closing, and the original check for $15,000 to the Sellers.

69. Kenneth Withrow denied that Franklin Withrow and Sharon had contributed any of the purchase price. He testified that he had personally constructed several other houses on other properties he had bought and that when he bought this property and built the house with the contributed labor of his sons he did not consider it as a permanent home for Franklin Withrow. He testified that he had provided a place of residence for both Franklin Withrow and his other son Johnny (both in their mid-40s) for nearly all of their lives although Johnny's residence has been in Kenneth Withrow's home.

70. Kenneth Withrow stated that he sawed the rough cut white pine siding, the roof rafters, and the rest of the

lumber for the house. He produced and introduced into evidence 29 checks for $4,727.63 for material he said was bought for the house. He introduced into evidence an additional 13 original invoices totaling $1,372.90 for material he said was used in the house construction. He testified that he physically built the subject house and that he had exercised dominion and control by deciding, for example, to require Franklin Withrow to remove a deck that Franklin Withrow had built that he felt was harmful to the property. He testified that he "allowed" Franklin Withrow to stay on the property.

71. Title to the subject property was taken in the name of Kenneth Withrow, the father of Franklin Withrow. Possession of the property came into the exclusive possession of Franklin Withrow in 1981 and remained in his exclusive possession until seized by the Government under this forfeiture action in 1993.

72. Franklin Withrow has never paid his father any rent for the premises. There was never any claim of dominion by Kenneth Withrow over the property until a claim was filed by him in this action. No disclaimer of title was made by Franklin Withrow until the instant action was filed. Neither Franklin Withrow or Kenneth Withrow has ever claimed a loan from Kenneth Withrow for purchase money for the property.

73. Although Kenneth Withrow provided funds for the purchase of the defendant property and provided some labor and materials for the construction of the house, he had no further involvement with the management or upkeep of the

defendant property. Just as he had previously provided Franklin Withrow with a house which Franklin Withrow subsequently lost in a divorce, and had provided his other son Johnny with a place to live, Kenneth Withrow gave the defendant property to Franklin Withrow. Kenneth Withrow has never exercised any dominion or control over the defendant property and is merely a record title owner. Franklin Withrow, who has always exercised ownership rights to the defendant property and held himself out to the world to be the owner of the defendant property, is the true owner of the defendant property.

CONCLUSIONS OF LAW

1.

A forfeiture proceeding is an *in rem* action brought against seized property pursuant to the fiction that the property itself is guilty of facilitating a crime. *See, Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974). To contest a forfeiture action, an individual must first demonstrate an interest in the seized property sufficient to satisfy the court of his standing as a claimant. *U.S. v. $346,960 in U.S. Currency*, 661 F.2d 319, 326 (5th Cir. 1981).

2.

If the claimant lacks standing, there can be no challenge to the forfeiture action. It is well established that in order to contest a forfeiture, a claimant must first demonstrate a sufficient interest in the property to give him/her Article

III standing; otherwise, there is no "case or controversy" in the constitutional sense, capable of adjudication in the federal courts. *U.S. v. $38,000*, 816 F.2d 1538, 1543 (11th Cir. 1987); *See also U.S. v. One 18th Century Colombian Monstrance*, 797 F.2d 1370 (5th Cir. 1986) *reh'g denied with opinion*, 802 F.2d 837, 838, *cert. denied, Newton v. United States*, 481 U.S. 1014 (1988); *U.S. v. $500,000*, 730 F.2d 1437, 1439 (11th Cir. 1984). Secondly, the claimant must establish statutory standing. *$38,000*, 816 F.2d 1538 (11th Cir. 1987).

3.

The burden to establish standing is on the claimant. *Rakes v. Illinois*, 439 U.S. 128, 130-131 (1978); *See U.S. v. $500,000*, 730 F.2d 1437 (11th Cir. 1984); *U.S. v. $280,505*, 655 F.Supp. 1487, 1495 (S.D. Fla. 1986). Accordingly, unless a claimant can demonstrate that he/she has a "legally cognizable interest in the property that will be injured if the property is forfeited" to the United States, this Court lacks jurisdiction to consider his/her claim. *$38,000 supra*, 816 F.2d at 1543-44 n. 12.

4.

It is the owner or owners of property who have standing to challenge a forfeiture. In general terms, ownership may be defined as a possessory interest in the seized property with its attendant characteristics of dominion and control. *U.S. v. 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27, 28 (8th Cir. 1979); *U.S. v. Twenty Cashier's Checks*, 897 F.2d 1567, 1571 (11th Cir. 1990). However, "the possession

of bare legal title to the res may be insufficient to establish ownership" where, for instance, the title holder is only a nominal owner. *Id.* at 28-29; *See also U.S. v. 1945 Douglas C-54 (DC-4) Aircraft*, 647 F.2d 864, 866-867 (8th Cir 1981); *U.S. v. $280,505*, 655 F.Supp. 1487, 1495 (S.D. Fla. 1986). It is well established that documents of title are not the *sine qua non* of ownership. *U.S. v. DKG Appaloosa*, 630 F.Supp. 1540, 1548 E.D.Tx. 1986). Thus, bare legal title alone is not sufficient to establish standing in a forfeiture proceeding. *United States v. 526 Liscum Drive, Dayton, Montgomery County, Ohio*, 866 F.2d 213, 217 (6th Cir. 1988); *United States v. A Single Family Residence*, 803 F.2d 625, 630 (11th Cir. 1986); *United States v. One 1978 Piper Navajo PA-31 Aircraft*, 748 F.2d 316, 319 (5th Cir. 1984); *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27, 28 (8th Cir. 1979) *cert. denied*, *Stumpff v. United States*, 454 U.S. 1143 (1982). The rationale behind this rule is based upon "a candid determination that things are often not what they appear to be, especially in the world of drug trafficking. . . . In brief, people engaged in illegal activities often attempt to disguise their interests in property by placing title in someone else's name." *A Single Family Residence*, 803 F.2d at 630, *quoting United States v. One 1977 36 Foot Cigarette Ocean Racer*, 624 F.Supp. 290, 294-95 (S.D. Fla. 1985).

5.

The claimant in a forfeiture action has the burden of clearly asserting and proving that he possesses a "legally cognizable interest in the property that will be injured if the property is forfeited" to the United States. *$38,000*, 816

F.2d at 1543-44, n.12. Thus, unless claimant, Kenneth Withrow, who claims to be the owner of the defendant property, can demonstrate that he has an interest in the property that will be injured if the property is forfeited to the United States, he lacks standing and this Court lacks jurisdiction to consider his claim. *$38,000.00*, 816 F.2d at 1543-44 n. 12; *See United States v. One 1971 Porsche Coupe*, 364, F.Supp. 745, 748 (E.D. Pa. 1973) (finding that claimant father lacked sufficient interest in property to challenge its forfeiture where he would not actually suffer from the loss of the property).

6.

A mere nominal owner, who fails to exercise dominion and control over the property, lacks standing to contest the forfeiture of the seized property. *See, e.g., United States of America v. Approximately 11.947 Acres . . . on Boss Hardy Road, Barrow County, Georgia*, Civil Action No. 2:90-CV-0005WCO slip op. (N.D. Ga. December 9, 1991).

7.

The facts here are that Kenneth Withrow has never lived on the defendant property and visited the property only several times a year to speak with his son. Kenneth Withrow's son Franklin Withrow has lived on the defendant property rent free since the house was built on the property. Franklin Withrow returned to live on the property following his incarceration for possessing marijuana on the defendant property. During Franklin Withrow's incarceration for possessing marijuana on the defendant property, Kenneth

Withrow was aware that Franklin Withrow's girlfriend — a woman known to Kenneth Withrow as "Doris" — was living on the defendant property rent free. Kenneth Withrow has little knowledge of who resides on the defendant property with Franklin Withrow at any given time. Franklin Withrow grew marijuana on the defendant property and openly stored and dried marijuana throughout the house on the defendant property — even hanging it from a mounted deer head in the living room — without any apparent fear of being discovered. Franklin Withrow also previously stored marijuana on the defendant property in the garage and in garbage bags in an unfinished addition to the house. Franklin Withrow and his former wife, Sharon, paid the property taxes, insurance premiums, and utilities for the defendant property and also paid for construction materials and labor on the residence. A garage, exposed ceiling rafters, and, a large addition to the house on the defendant property were built at Franklin Withrow's and his wife's request. Franklin Withrow previously lost a house given to him and built by his father Kenneth Withrow in a divorce, and thus, Kenneth Withrow had every incentive to keep the defendant property titled in his name to protect it. Franklin Withrow has held himself out to the world to be the owner of the defendant property.

8.

Claimant Kenneth Withrow never exercised any dominion or control over the defendant property. He has failed to prove that he was ever more than a mere nominal owner.

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9.

Georgia Law at O.C.G.A. § 44-5-85 provides:

> The exclusive possession by a child of lands which originally belonged to the parent or parents, without payment of rent, for the space of seven years, creates a conclusive presumption of a gift and conveys title to the child, unless there is evidence of a loan, of a claim of dominion by the parent or parents acknowledged by the child, or of a disclaimer of title by the child.

10.

In the instant case the son, Franklin Withrow, was in exclusive possession of land which belonged to his father, without payment of rent. There was no loan between Kenneth and Franklin Withrow for the property. No claim of dominion was made by Kenneth Withrow or disclaimer made by Franklin Withrow until some twelve years after Franklin Withrow went into exclusive possession of the property. A conclusive presumption arose after seven years from Franklin Withrow taking exclusive possession of the property that it was a gift to him from his father. At the conclusion of seven years Franklin Withrow became the owner of the subject property. *Sims, et al. v. Holtzclaw, et al.*, 259 Ga. 537, (1989).

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11.

Kenneth Withrow lacks standing as he has failed to show that he will be injured by the forfeiture of the defendant property. It is clear that Franklin Withrow is the true owner of the property and is the only one who will be injured by the forfeiture of the property.

12.

Kenneth Withrow has failed to prove he has any ownership interest in the property.

13.

Claimant Franklin Withrow has claimed only a "usufruct" interest in the defendant real property, akin to asserting that he has a "tenancy at will," and has claimed that his father is the owner of the property. The interest in real property of a tenant at will or holder of a "usufruct" is no greater than the interest of the landlord or owner.

14.

To the extent that Franklin Withrow has only claimed a usufruct or "tenancy at will" interest in the defendant property, he cannot recover against the United States because claimant Kenneth Withrow, whom Franklin Withrow claims to be the landlord and owner of the defendant property, has intervened and asserted his alleged superior rights to the defendant real property.

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15.

Claimant Franklin Withrow's claimed interest as the holder of a usufruct as to the defendant property is a lesser included interest of Kenneth Withrow's claimed ownership interest. Thus, to the extent that Franklin Withrow's claim is limited to a usufruct interest or tenant at will, because claimant Kenneth Withrow has failed to establish standing to contest this forfeiture action, Franklin Withrow's claim also fails. However, inasmuch as Franklin Withrow is in fact the true owner of the defendant property, he does have standing in that capacity.

16.

To achieve forfeiture under 21 U.S.C. § 881(a)(7), the United States must establish probable cause to believe that the defendant real property was used, or was intended to be used, in any manner or part, to commit or to facilitate illegal drug activity. 21 U.S.C. § 881(a)(7). The burden is on the United States to establish probable cause for the belief that a substantial connection exists between the property to be forfeited and an illegal drug transaction. *United States v. $4,255,625.39*, 762 F.2d 895, 903 (11th Cir. 1985). *cert. denied*, 474 U.S. 1056 (1986).

17.

In demonstrating a substantial connection between the defendant property and illegal drug transactions, the government is not required to show that the property was integral, essential, or indispensable to the drug activity; *See*

e.g. United States v. Approximately 50 Acres of Real Property, 920 F.2d 900, 902 (11th Cir. 1991) (*per curiam*); *United States v. Real Property and Residence at 3097 S.W. 11th Avenue*, 921 F.2d 1551 (11th Cir. 1991); *United States v. Reynolds*, 856 F.2d 675 (4th Cir. 1988); *United States v. Premises Known as 3639 2nd Street, N.E.*, 869 F.2d 1093 (8th Cir. 1989); *United States v. Santoro*, 866 F. 2d 1538, 1545 (4th Cir. 1989); *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 727-28, *cert. denied*, 461 U.S. 94 (1983) (5th Cir. 1982); *United States v. 26.075 Acres in Swift Creek Township*, 687 F.Supp. 1005 (E.D.N.C. 1988); *United States v. 124 East North Avenue*, 651 F.Supp. 1350, 1353-4 (N.D.Ill, 1987); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

18.

Courts agree that property may "facilitate' illegal drug activity if it makes the illegal activity "easy or less difficult,' *United States v. One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884, 887 n.3 (11th Cir. 1989), or if it lessens the labor involved in handling the illegal substances. *United States v. One 1971 Chevrolet Corvette Auto*, 496 F.2d 210, 212 (5th Cir. 1974).

19.

This Court has recognized that, "[u]nder 21 U.S.C., § 881(a)(7) property is subject to forfeiture if it is merely intended to be used to facilitate the commission of a drug violation." *See United States v. All That Tract . . . 2262 Cave Springs Road, et al.*, Civil Action No. 4:90-cv-

170-HLM (March 19, 1991, Murphy, J.), slip op. at 3; *See also United States v. Approximately 50 Acres of Real Property*, 920 F.2d 900, 902 (11th Cir. 1991) (*per curiam*) (finding that evidence that property was used to negotiate and plan essential component of drug transaction was sufficient connection). *United States v. Real Property and Residence at 3097 S.W. 111th Avenue*, 921 F.2d 1551 (11th Cir. 1991) (finding property subject to forfeiture based on planned delivery of cocaine in driveway of residence); *United States v. 124 East North Avenue*, 651 F.Supp. 1350, 1353-4 (N.D.Ill, 1987) (finding that regular use of telephone to coordinate sale and delivery of cocaine plus intent to use home as situs of delivery of 5 kilos of cocaine constituted probable cause to forfeit under § 881(a)(7)).

20.

Furthermore, growing marijuana, whether or not for personal use, is an activity sufficient to subject the property on which cultivation occurs to civil forfeiture under section 881(a)(7). *See United States v. One Parcel of Real Property*, 960 F.2d 200 (1st Cir. 1992).

21.

The definition of probable cause is a reasonable ground for belief of guilt supported by less than prima facie proof but more than mere suspicion. Probable cause is judged not with clinical detachment but with a common sense view to the realities of normal life. *United States v. A Single Family Residence*, 803 F.2d 625, 628 (11th Cir. 1986); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1426 (11th Cir. 1983).

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22.

The existence of probable cause is a matter of law. *United States v. Nixon*, 629 F.Supp. 857, 858 (N.D. Ala. 1986) (citing *United States v. Four Million Two Hundred and Fifty-Five Thousand*, 762 F.2d 895, 903 n. 17 (11th Cir. 1985); *cert. denied*, 106 S.Ct. 795 (1986)); *United States v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1434 (9th Cir. 1985). Probable cause may be based wholly on circumstantial evidence, which may include facts learned after the seizure. *United States v. $41,305.00 in Currency & Traveler's checks*, 802 F.2d 1339, 1343 (11th Cir. 1986); *Four Million Two Hundred and Fifty-Five Thousand*, 762 F.2d at 902 n. 12, 904.

23.

Moreover, hearsay may be used to establish probable cause. *United States v. A Single Family Residence*, 803 F.2d 625, 629 n.2 (11th Cir. 1986). *See also United States v. Miscellaneous Jewelry*, 667 F. Supp. 232, 238 (D. Md. 1987), *aff'd, One 1985 Nissan 300 ZX, et al.*, 889 F.2d 1317 (4th Cir. 1989) (citing *A Single Family Residence*) (stating that the United States may use hearsay to show probable cause); *United States v. Nixon*, 629 F.Supp. 857. 858 (N.D. Ala. 1989) (citing *Bush v. United States*, 389 F.2d 485 (5th Cir. 1968)).

24.

Probable cause exists to believe that the defendant real property was used, and was intended to be used, to facilitate

the manufacture, sale and/or distribution of marijuana in violation of 21 U.S.C. § 881(a)(7).

25.

Once the government makes a sufficient showing of probable cause, the burden of proof in a civil forfeiture proceeding shifts to the claimant to show, by a preponderance of the evidence, that the defendant real property is not subject to forfeiture. *United States v. $4,255,625.39*, 762 F.2d 895, 904 (11th Cir. 1985). A claimant can meet this burden by either rebutting the government's evidence that the defendant real property was used to facilitate illegal drug activities or by showing that he or she is an innocent owner who did not know of the property's connection with drug sales. *United States v. A Single Family Residence*, 803 F.2d 625, 629 (11th Cir. 1986). Failure to rebut a showing of probable cause to believe the defendant property was used or intended to be used to facilitate a violation of Title 21 U.S.C. is sufficient by itself to warrant forfeiture. *United States v. $5,644,540.00 in United States Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986); *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983). In the instant case, the claimants have failed to rebut the government's evidence that the defendant real property was used to facilitate the manufacture of marijuana.

26.

All persons and entities connected with real property subject to forfeiture are wrongdoers except those who are innocent owners. *United States v. One Single Family*

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Residence Located at 15603 85th Avenue North, Lake Park, Palm Beach County, Florida, 933 F.2d 976, 981 (11th Cir. 1991).

27.

In the context of civil forfeiture actions, an individual asserting the defense of "innocent ownership" must establish (1) that he or she was uninvolved in the wrongful activity, (2) that he or she was unaware of the wrongful activity, and (3) that he or she "had done all that reasonably could be expected to prevent the proscribed use of the property." *Calero-Toledo v. Pearson Yacht Leasing Company*, 416 U.S. 663, 689-90, 94 S.Ct. 2080, 2094-95 (1974).

28.

The evidence in this case was unrebutted that there is probable cause to believe the defendant real property was used or intended to be used to facilitate the manufacture, sale and/or distribution of marijuana, and therefore, the property is forfeited to the United States pursuant to Title 21 U.S.C. § 881(a)(7).

29.

Furthermore, notwithstanding the fact that Franklin Withrow limited his claim to the defendant property to a usufruct or tenancy at will, interest which is now defeated in light of the failure of Kenneth Withrow to establish standing, Franklin Withrow is in fact the true owner of the defendant property and has standing in that capacity.

However, it is clear that Franklin Withrow used the defendant property to facilitate his manufacture of marijuana in violation of 21 U.S.C. § 881(a)(7), and he is not an innocent owner of the defendant property. Therefore, the defendant property shall be forfeited to the United States unless claimant can prevail upon his double jeopardy claim.

30.

The Court reserved the double jeopardy issue in this case until after a decision upon the factual issues.

31.

It is now appropriate for the Court to consider the double jeopardy claim made by claimants.

ACCORDINGLY, the parties shall have ten days within which to file briefs upon this remaining issue; and, the Clerk shall then submit this case to the Court for further consideration.

IT IS SO ORDERED, this the 5th day of June, 1996.

s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MARCH 10, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-9237

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROUTE 7, Box 7091, CHATSWORTH, GEORGIA, and all appurtenances thereon, being approximately five acres of land lot 209 in the 26th district and 2nd second of Murray County,

Defendant,

KENNETH G. WITHROW, clm,
FRANKLIN WITHROW, clm,

Claimants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

BEFORE: TJOFLAT, BIRCH, and CARNES, Circuit Judges.

Appendix E

PER CURIAM:

The petition for rehearing filed by the Appellants, Kenneth G. Withrow and Franklin Withrow is GRANTED as to the question of whether the seizure of the property at issue violated the Fifth Amendment Due Process Clause, and, if so, whether as a result of the seizure the appellants were deprived of rents they would have received from their property. *See United States v. 408 Peyton Road*, 162 F.3d 644, 652 (11th Cir. 1998) (en banc). The case is REMANDED to the district court for reconsideration in light of *408 Peyton Road.* In all other respects, the petition is DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE